UNITED STATES GOVERNMENT BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

CASE NOS. 12-CA-19668, et al.

GOYA FOODS OF FLORIDA, INC.,
Petitioner,
v.
SOUTHERN REGIONAL JOINT BOARD, WORKERS UNITED, a/w SEIU,
Respondent.

PETITIONER'S AMENDED BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE

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STATEMENT OF THE CASE

A. <u>Procedural History</u>.

This matter came before the Administrative Law Judge upon a compliance specification issued by Region 12 of the Board on June 30, 2010. GC1(f)¹ The specification addresses a part of the remedy ordered by the Board in its decision dated April 30, 2006. Goya Foods of Florida, 347 NLRB 1118 (2006). Specifically, the specification addresses reinstatement and back pay remedies ordered as to former Goya employees Alberto Turienzo and Jesus Martin and whether private, non-board settlement agreements ("the settlements") entered into between Goya and the former employees should be given effect by the Board. GC1(f). Counsel for the general counsel opposes giving effect to the settlements. Id. Subsequent to the Board's 2006 decision, Goya had filed a motion for reconsideration and to reopen the hearing with the Board based, in part, on changed circumstances created by the settlements. GC1(b). Counsel for the general counsel opposed the motion, arguing that "Respondent can address the non-Board settlement agreements through the Board's compliance proceedings." GC1(c) at 6. The Board denied Goya's motion, stating, in pertinent part, "Finally, [Goya] contends that three of the four discriminatees in this case have privately settled with the Respondent and waived their rights to reinstatement and back pay under the Board's order. We agree with the General Counsel that these matters should properly be raised and litigated in the compliance stage of this proceeding." GC1(d) at 4.

Exhibits will be cited herein by the initials of the proponent and the number of the exhibit, along with page numbers as needed for clarity. Exhibits proposed by the counsel for the general counsel shall carry the initials "GC" and those submitted by Respondent Goya shall carry the initial "R." The transcript of the hearing shall be cited using the initial "T" and the page and line numbers as needed for clarity, *e.g.*, "T 1:1 to 2:25."

A two-day hearing was convened on January 11-12, 2011. T 1, 188. During the hearing, the Judge revoked a subpoena ad testificandum issued by the Region on behalf of Goya and denied Goya's motion to reconsider that ruling. T 52-55, 282, 287. During the hearing, the Judge denied Goya's motion to dismiss the specification made at the close of counsel for the general counsel's case in chief. T 282, 287. The Judge issued her "Supplemental Decision" and Order Transferring Proceeding to the National Labor Relations Board on March 21, 2011.

Goya hereby submits this Brief in Support of Exceptions to Decision of Administrative Law Judge.²

B. Statement Of The Facts.

In *Goya Foods of Florida*,³ the Board found that a Goya salesman named Reinaldo Bravo lost sales accounts about September and October of 1999 that were not replaced. *Goya Foods of Florida*, 347 NLRB at 1119. The Board also found that then-employees Alberto Turienzo, Jesus Martin, and Humberto Galvez were discharged after they took part in a disturbance inside the

Goya is concurrently submitting Exceptions to Decision of Administrative Law Judge.

References to the Board's findings in Goya Foods of Florida are for background purposes only. Counsel for the general counsel improperly attempted to insert into these proceedings irrelevant insinuations of anti-union animus on the part of a Goya executive and, by extension, Goya, by reference to portions of the recommended order of the administrative law judge in Goya Foods of Florida. T 324-39. Not only were the attempted insinuations irrelevant and improper, they were factually inaccurate, as counsel for the general counsel had failed to ascertain that the individual referred to by the judge in the referenced portion of Goya Foods of Florida was a different person from the witness she was attempting to impeach in these proceedings. *Id.* The Judge in the present proceedings correctly ruled that no issue of anti-union animus was before her in these proceedings. T 327:11-15. To her credit, when counsel for the general counsel admitted her error, after her heated and protracted argument, she apologized and abandoned the entire line of questioning. T 339:6-23. The plain implications of counsel for the general counsel abandoning her point, as she herself articulated it, are discussed below.

retail establishment of one of Goya's clients. *Id.* A hearing on unfair labor practice charges relating to these employees was held before an administrative law judge from June 5 to 21, 2000. *Id.* at 1127. The judge issued his recommended decision on February 22, 2001. *Id.* at 1118. The Board ultimately ordered reinstatement of accounts and back pay for Bravo and reinstatement and back pay for Turienzo, Martin, and Galvez. *Id.* at 1124-25.

The union and some or all of these four employees had been slandering Goya in the media and elsewhere before, during, and after the 2000 hearing. T 88, 171, 300-03, 314, 340-41, 354, 371-72. Turienzo admitted in testimony that he did so. T 171. On May 30, 2000, prior to the hearing, Goya Foods of Florida's then-President Robert Unanue sent a letter to union official Monica Russo. R4. The four alleged discriminatees and Board lawyer Arturo Ross, who was prosecuting the case, were copied on the letter. *Id.* In the letter, Goya offered full back pay without reinstatement to the alleged discriminatees. *Id.* The offer was received but not accepted. T 351.

Settlement negotiations between Goya, the union, the Board, and the four alleged discriminatees continued during the hearing in the Miami offices of the Board. T 120-21. During several hours of negotiations meetings, Goya attorneys met with and discussed possible settlement in the simultaneous presence of Board attorney Ross, the four alleged discriminatees (for whom Ross translated to and from English and Spanish), union attorney Ira Katz, and possibly others. T 154, 176-77. Goya offered double back pay without reinstatement. T 181. Turienzo, speaking for the other employees, demanded \$300,000 apiece to settle, and the negotiations thereby foundered. T 181.

Some time subsequent to the close of the hearing, approximately July, August, or September 2000, Turienzo called Robert Unanue at his offices at Goya in Miami. T 352-53. He

said he wanted to meet with Mr. Unanue to discuss settlement. *Id.* Mr. Unanue agreed and the two met in Mr. Unanue's offices a few days later. *Id.* In exchange for a monetary settlement, Turienzo offered to stop slandering Goya. T 354. He also said he could obtain agreement from the others to do the same. *Id.* He said that he was agreed to not being reinstated. T 355. He did not want it known that any settlement negotiations were occurring. T 354. Turienzo left, saying that he would contact Goya again on the subject. T 356.

Turienzo did contact Mr. Unanue again and a meeting was arranged to occur at the office of Frank Unanue at the facilities of Sazon, near Goya's facility. T 357. Turienzo wanted the meeting away from Goya because of his confidentiality concerns. T 304. Turienzo, Martin, Galvez, Bravo, Robert Unanue, and Frank Unanue attended. T 297. Frank Unanue was not affiliated with Goya Foods of Florida at the time, but Robert Unanue, his cousin, had asked Frank to help with the matter. T 336. Frank had worked at Goya Foods of Florida some years previously and knew some or all of the men. *Id.* There was a general discussion of concepts for a settlement, including the idea of back pay in exchange for a stop to the slander and confidentiality. T 358-59. Turienzo offered for the men to stop slandering Goya as part of a settlement. T 302-03, 314. Reinstatement was not demanded. T 300-01. The men demanded confidentiality, which was not an issue of consequence to Goya, but to which it agreed because the men requested it. T 304, 346-48. The meeting ended without agreement, but with an understanding that there would be one or more further meetings. T 306, 362:4-5.

A second meeting occurred, also at Sazon, about two weeks after the first. T 305, 309. Attending were Turienzo, Martin, Bravo, and Mr. Frank Unanue. T 305. Goya had prepared draft settlement documents based on what had been discussed at the first meeting of the group. T 306. The documents were in English and Spanish. GC 3, 4, 5. Mr. Unanue gave them to the

men and suggested they take the documents with them, review them, consult with whomever they wished to consult, and to call Goya when they were ready to talk further or if they had questions. T 307, 311-12. Mr. Unanue did not make any attempt to interpret or explain the documents to the men. T 311.

Mr. Robert Unanue spoke subsequently with Martin on the telephone about the subject and with Turienzo on the subject, both primarily to work out the payment amounts. T 362-63. Turienzo confirmed in testimony that he spoke with Mr. Robert Unanue as many as three times in the 15 days prior to his signing the settlement. T 148:11-16. Mr. Robert Unanue and Mr. Frank Unanue subsequently met with Martin on October 4, 2000, and with Turienzo on October 31, 2000, at which time the settlements were signed and the men received payment. GC3, 4; T 79-80, 83, 137, 149, 236.

In a sworn affidavit Turienzo gave to the Board, he stated, "I signed the settlement agreement of my own free will and was not threatened or coerced in any way by anyone or anything." T 149:20 to 150:2. Turienzo ratified that statement in testimony. T 150:4-14. In the affidavit, Turienzo stated that he read the settlement agreement. T 150:17. He stated that he noted he was giving up his employment and any claims against Goya. T150:17-19. He ratified that statement in testimony. T 152:13-20. He stated in his affidavit that he told union officials about the settlement five or six days after he signed it and that they told him it was invalid because he did not sign it in front of a judge – a clear misrepresentation of the law. T 152:21 to 153:4. On cross-examination, he had difficulty remembering with whom at the union he spoke, saying first one, then another, then a third name. T 153-54.

Turienzo testified that he did not think the settlement was binding on him, but that he took the payment anyway. T 162. He acknowledged that the settlement obliged him to give up

any claims against Goya. T 163-64. He testified that he knew he would not be returning to work for Goya. T 164. He testified he understood that he was giving up his right to money or any other relief. T 164. He testified that he knew he waived his right to recover in any action brought on his behalf, including one by the Board. T 164-65. He testified that he acknowledged he carefully read and understood the settlement. T 165. He testified that he was encouraged to consult an attorney before signing. T 165. He acknowledged the settlement was given to him in both English and Spanish. T 165-66. Despite the above testimony, during redirect examination he contradicted his earlier testimony and said that he did not read the settlement agreement at all. T 135, 168.

Martin gave a sworn affidavit to the Board in 2008. T 240. Martin stated in the affidavit and testified that Mr. Frank Unanue had called him in September 2000, a few weeks before he eventually signed the settlement. T 242-43. He testified further that both Mr. Frank Unanue and Mr. Robert Unanue called him a number of times during that period. T 243. He stated in the affidavit and confirmed in testimony that he signed the settlement without threat or coercion. T 242. He stated in the affidavit and testified that two or three weeks passed between the time he was first offered a settlement and when he signed it. T 243. He testified that he called Turienzo during September 2000, and Turienzo urged him to agree to the settlement because the union had lost the unfair labor practice trial. T 245:2-22, T 249. Martin said this conversation occurred shortly after Martin spoke with Mr. Frank Unanue the first time about a settlement. T 249. In his statement, Martin said, as to Turienzo's assertion that the union had lost the case, "Turienzo told me that, if that was the case, then we had to sign the agreement with the Employer." T 250. Martin recommitted to that statement in testimony. T 250:19-22. He acknowledged that he meant there was doubt as to whether the case had been lost. T 250:23 to 251:1.

Martin testified that he called Turienzo because he was in doubt about whether the case had been lost. T 252. He regarded Turienzo as a friend and advisor. T 252:2-14. In his affidavit, Martin also alleged that Gilberto Torres, a Goya employee, had called him two or three times in September 2000 to tell him the union lost the case and to urge him to sign the settlement. T 255. Martin stated in the affidavit and in testimony that he believed what Torres told him. T 255, 260:7-16. He said he believed him because he was a "friend," despite Martin's feeling "betrayed" by Torres when Torres had, in his words, "turned against the union." T 253:4-7, 255:13-15, 255:21, 256:17-18, 258:2-8. In fact, he testified on redirect that he felt betrayed by Torres even as Torres was telling him that the union had lost the case. T 276:18:20. Martin stated in his affidavit and in testimony that he also believed Mr. Frank Unanue that the

At this point in the proceedings, Turienzo, who, although being one of counsel for the general counsel's witnesses, attended most of the hearing, interjected the word, "Good" in response to Martin's answer about Torres. T 258:2-9. Counsel for Goya objected and asked that the Judge issue a warning. Turienzo left the room pretending to cough to cover his interjection. T 258:17-18. The Judge stated that she did not hear the comment. T 258:13. However, the comment obviously was picked up by the court reporter's microphone and appears in the record. T 258:9. The Judge stated generally that no comments were to be made "in reference to the testimony by counsel, by anyone designated as essential to the presentation of Respondent's case." T 259:18-20. Nonetheless, Turienzo, after this warning, again interjected loudly during testimony. T 341. This time, he answered "No," after a question by counsel for Goya to a witness on the witness stand, before the witness had answered, and again fled the room to avoid the immediate consequences of his impropriety. T 341:21-25. Again, the Judge said she did not hear the comment. T 343:7-8. She stated that there should be no comments. T 342-43. Additionally, Turienzo claimed not to understand English and the judge specifically mentioned this in her Decision, relying on his and Martin's lack of English in finding them credible, as irrelevant as that is to such a determination. Turienzo proved he was lying about his ability to understand English when he slipped and addressed an attorney in English during the hearing, in addition to the incidents recounted just above. T 165:6-7. Turienzo's conduct, as discussed below, reflects on his credibility as a witness.

union had lost the case. T 261. Martin testified that he believed Mr. Frank Unanue because he believed Torres. T 261:16-21.

Martin stated in his affidavit and in testimony that he understood at the time he signed the settlement that he was giving up any claim to employment by Goya and any claim against Goya. T 262. Martin stated in his affidavit that he did not speak to anyone before signing the settlement and confirmed that statement in testimony. T 264:9-11. However, as he already had testified, he did, in fact, speak with Turienzo before signing the settlement, which he also and immediately acknowledged in testimony. T 264:12-14.

Martin acknowledged that he signed the settlement and that it recited that he'd been encouraged to seek an attorney. T 265. He stated that he felt the settlement to be binding on him and Goya. T 267-68. Martin stated that he learned, years ago, that the unfair labor practice case ruling was against Goya. T 269. He admitted that he took no action with regard to the settlement. T 269:1 to 270:11. He admitted that he had done nothing to challenge the settlement even though he had concluded long ago that he had been lied to by Goya. T 274, 275.

From the time the settlements were signed until Goya was asked by the Board for its position on the effectiveness of the settlements, Goya never received any charge, lawsuit, complaint, or challenge of any kind from anyone, including Turienzo or Martin, regarding the settlements. T 161. Turienzo testified that he does not challenge the validity of the settlement he entered into. T 161:3-5. Martin testified that he has never contacted a lawyer, the union, or the Board about overturning the settlement he entered into. T 274-75. Martin testified that he still feels the settlement obligated both Goya and him. T 268.

SPECIFICATION OF QUESTIONS TO BE ARGUED

- 1. Whether the Judge erroneously credited the testimony of Turienzo and/or Martin and discredited the testimony of Robert and Francisco Unanue. This question relates to Exceptions numbered 4, 5, 6,7, 9, 10, 11, 15, 16, and 18.
- 2. Whether the Judge erroneously concluded that the first *Independent Stave* (agreement of the parties to be bound) factor weighed against Goya. This question relates to Exceptions numbered 3, 12.
- 3. Whether the Judge erroneously concluded that the second *Independent Stave* factor (reasonableness of the settlements) weighed against Goya. This question relates to Exceptions numbered 13, 14.
- 4. Whether the Judge erroneously concluded that the third *Independent Stave* factor (fraud, coercion, or duress) weighed against Goya. This question relates to Exceptions numbered 8, 17, 18, 19.
- 5. Whether the Judge erroneously concluded that the fourth *Independent Stave* factor (history of prior violations or breaches of settlements) weighed against Goya. This question relates to Exceptions numbered 21.
- 6. Whether the Judge erroneously concluded that the settlements were repugnant to the Act. This question relates to Exceptions numbered 20.
- 7. Whether the Judge erroneously granted the motion to revoke Goya's subpoena of Arturo Ross and subsequently denied Goya's motion to reconsider that ruling. This question relates to Exceptions numbered 23, 24, 25, 26.

- 8. Whether the Judge erroneously denied Goya's motion to dismiss the specification at the close of counsel for the general counsel's case in chief. This question relates to Exception numbered 27.
- 9. Whether the Judge erroneously concluded that both settlements should be rejected. This question relates to all the Exceptions.

ARGUMENT AND CITATION OF AUTHORITY

POINT I

THE BOARD SHOULD GIVE EFFECT TO THE SETTLEMENT AGREEMENTS BETWEEN GOYA AND TURIENZO AND MARTIN.

A. There Is No Legal Or Factual Basis For The Board Not To Give Effect To The Settlement Agreements.

The judge made unfounded and incorrect factual findings and incorrect legal conclusions and, most egregiously, relied on faulty reasoning to make credibility resolutions. As a result, the Board may and should reject the judge's findings, conclusions, and faulty resolutions.

The Board looks to the non-exclusive list of factors set forth in *Independent Stave Co.*, 287 NLRB 740 (1987), in determining whether to approve settlements such as those at issue herein. Those factors are:

(1) [W]hether the charging party(ies), the respondent, and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risk inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

It is not required that a settlement agreement "fully remedy" all charged violations. *Id.*The Board "upholds settlements unless a 'settlement ... is at odds with the [NLRA] or ... with the

Board's policies." *Beverly California Corp. v. NLRB*, 253 F.3d 291 (2001). In that case, the court upheld the Board's rejection of a settlement that was reached after liability had already been found and that represented a very small fraction of the back pay amount that the Board decided was appropriate. By contrast, in *American Pacific Concrete Pipe Co.*, 290 NLRB 623, 624 (1988), the Board approved a settlement in which the discriminatee was paid only 50 percent of the amount the general counsel calculated he was due. The Board reasoned that, even though liability was established, "back pay litigation also entails risks and uncertainties which must be considered in evaluating the appropriateness of accepting a settlement agreement in lieu of pursuing further litigation." *Id.*

The risks of litigation are measured at the time and stage of litigation at which the settlement is entered, as correctly noted by the judge. Further, the Board has long recognized that litigation risk exists even in cases where liability has already been determined and only back pay amounts remain to be litigated. *E.g.*, *American Pacific Concrete Pipe Co.*, 290 NLRB 623, 624 (1988). In this case, no violation had yet been found at the time the settlements were entered into. Nonetheless, the judge incorrectly discounted the substantial litigation risk, including delay of resolution, that existed and erroneously found the settlements unreasonable.

No one factor is to be given determinative weight. In *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 615 (2007), the Board noted that, although both the union and the general counsel opposed approving the settlement agreements, they should be approved. The Board stated, "[T]he alleged discriminatees voluntarily agreed to be bound.... [T]hey were aware of the content, advised of the meaning, and knew that they were waiving and releasing claims against the Respondent.... [T]he termination agreements were reasonable in light of the violations alleged and the litigation risks presented. At the time the agreements were signed, no

charges had been filed and the prospects of litigation were not obvious." *Id.* The Board stated that, while the union and general counsel's opposition "is a consideration under this one factor, it should not be elevated to primary status." *Id.* at 615 n.9.

B. <u>The Overwhelming Weight Of The Credible Evidence Demonstrates That The</u> Settlements Were Not Obtained Through Fraud, Coercion, Or Duress.

The judge correctly found that the settlements were not obtained through coercion or duress. Indeed, both Turienzo and Martin, in their ex parte sworn affidavits to the Board, stated that they signed the settlements of their own free will and without threat. T 149:20 to 150:2, 242. The settlements themselves also included statements to the same effect – which both men acknowledged in testimony. GC 3, 4. However, she incorrectly concluded that the settlements were obtained through fraud. Her conclusion was unsupported by competent, credible evidence and should be rejected.

In *Beverly California Corp.*, 329 NLRB 977, 986 (1999), the administrative law judge ruled that private settlement agreements should not be given effect because there existed misrepresentations rising to the level of fraud. In that case, employees received proposed settlement agreements on documents carrying official captions of state law discrimination complaints they had filed, had the documents delivered to them by a state attorney in state offices, and were apparently led to believe that the amounts represented full back pay when they really were only about 15 percent of that amount. *Id.* Despite all this, the Board disavowed the judge's finding that the misrepresentations amounted to fraud. *Id.* at 977 n.1. Even if credited, which they should not be, the alleged misrepresentation in this case are quite mild compared to these, which the Board found not to be "fraud."

Despite this, the judge found that the settlements were obtained by fraud. Plainly, the account of the circumstances around the settlements given by Turienzo and Martin is designed to support an allegation of fraud against Goya. (The absolute incredibility of both the story itself and the witnesses who recounted it is discussed at length below.) First and foremost, the truth, testified to by Frank and Robert Unanue, is that the former employees sought out settlements, had ample time to review them, and entered into them freely. No one representing Goya lied to the men; no one representing Goya led the men to believe something that was not so; no one representing Goya misled the men. The subjects discussed with respect to the settlements were the terms of the settlements and Goya's encouragement of the men to seek whatever counsel they deemed fit.

It is important to note exactly what the *Independent Stave* standard says, however. In order to overcome the strong Board policy in favor of settlements, counsel for the general counsel must prove that the settlements were *obtained* through fraud. Even assuming, arguendo, that this absurd story about being told the case was lost was true, could it be that this alleged misrepresentation motivated Turienzo and Martin to agree to settle? The answer is no.

Martin testified that he believed the story about the case being lost because he was told it by Gilberto Torres, his former co-employee. Because he believed Torres, he said, he believed Frank Unanue. However, he also said that he had doubts about whether it was true. Because of those doubts, he said, he contacted Turienzo. He testified that Turienzo was his friend. He testified that he sought Turienzo's advice. He testified that he relied on Turienzo in this question. Turienzo told him that, *if* the union had lost the case, *then* the men must settle. Martin then was asked whether Turienzo's use of the word "if" meant that there was doubt as to whether the case had been won or lost. Martin said there was doubt. Asked about efforts to check the

story, Martin answered that he checked with Turienzo and did nothing else. Two or three weeks later, Martin signed the settlement. As explained in detail in the analysis of the credibility of the witnesses, Turienzo had close to two months to check out the story before he signed his waiver.

The judge correctly ruled that Torres was not an agent of Goya. Having thus concluded that nothing Torres allegedly said or did could be a basis for liability to Goya, the judge proceeded to make credibility resolutions about Torres' testimony and findings of fact regarding the allegations that he spoke with Martin. This analysis by the judge is not only irrelevant, it is prejudicial to Goya. It serves only to taint the record with egregious pejorative toward Goya. (The judge's credibility resolution is faulty in any case, as Torres strongly denied ever having spoken to Martin about any settlement. The judge fails to address this contradiction in the testimony or to resolve the credibility question it raises. Moreover, the judge dwells on and implies that she agrees with the unreasonable inferences proposed by counsel for the general counsel that Torres was bribed by Goya. The judge virtually ignores contrary evidence offered by Goya. The judge obviously is giving lip service only to the inescapable conclusion that Torres was not Goya's agent, but then goes on to base her analysis and conclusions in part on findings she implicitly makes anyway.) The judge's analysis in this regard, as in others throughout her Decision, violates the Supreme Court's mandate to this Board that it engage in "reasoned decision-making" by adhering to its own precedents and interpretations, if they are reasonable. The judge is plainly ignoring those precedents in her unstated conclusions against Goya based on her all-but-stated findings relating to Torres. The Board should not tolerate a decision made on such a basis.

The judge engages in a similar process, similarly prejudicial, when she describes, in great detail, rulings of the Board, other administrative judges, and even findings of fact and

conclusions of law from other cases involving Goya. These cases, she acknowledges, occurred long after the events underlying this case and can properly have no relevance to a decision regarding whether to give effect⁵ to the settlements. That is correct; why, then, does she not only mention them, but dwell on them? To a lesser, but still objectionable extent, the judge provides details of allegations regarding Reinaldo Bravo and Humberto Galvez. There is some background value to mentioning the settlements reached with Goya by these men. However, the judge's repeated inclusion of numerous, pejorative (to Goya), and irrelevant information about them has no other effect than to prejudice Goya. This is underscored by the judge's failure to acknowledge that the Board has chosen not to challenge the contracts reached with Bravo, although it occurred at the same time as those with Turienzo and Martin. In fact, the main relevance of Galvez and Bravo is counsel for the general counsel's failure to call them as witnesses to corroborate the testimony of Turienzo and Martin regarding the circumstances under which the settlements were reached. These former employees could be expected to testify on behalf of their fellow employees and in support of the theory that the settlements were reached by fraud. Galvez and Bravo were present for meetings with the Unanue and, even under the incredible version of events proposed by Turienzo and Martin, reached virtually identical settlements at the same time as Turienzo and Martin. The failure of counsel for the general counsel to call them requires the drawing of an adverse inference concluding that they would have testified truthfully and in contradiction to the absurd and false stories told by Turienzo and Martin. Apart from this, the mention of these matters, especially in such detail, can do nothing other than prejudice Goya and taint any decision.

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The judge at one point describes the central issue in this matter as determining the "validity" of the settlement contracts. The issue is whether the Board should give effect for purposes of its own processes to these indisputably valid contracts. The judge is not a competent authority to decide the "validity" of these contracts.

The question, then, is whether the above circumstances, if true, describe the settlements being obtained by fraud. The answer is that they do not. Martin admitted that he made virtually no effort to verify this alleged story and that he relied on Torres (whom he viewed as a turncoat) and Turienzo in concluding the story was true. Turienzo had six weeks to two months to verify the story. He was working for the union and had every opportunity to know or find out. He signed his agreement. Given the amount of time and opportunity each man had to check the story and given either the lack of effort or feebleness of effort to do so, it cannot be said they reasonably relied on this story in signing the settlements. The assertion that "you lost the case, therefore we're offering you money" is ridiculous on its face and any reasonable person would have been skeptical under any circumstances. To have doubts, as both testified they did, and either not check it, barely try to check it, and then sign the agreements anyway is something no reasonable person would do and precludes a finding that the settlements were "obtained" based on this risible story, even believing that it was told in the first place – which did not happen.

As such, and for the further reasons presented in the credibility section below, the judge was incorrect in concluding that the settlements were obtained through fraud. Her sole basis for this conclusion is her credibility resolution in favor of Martin and Turienzo over Robert and Francisco Unanue. As explained above and in the credibility section below, this is not competent and substantial evidence because the judge's theory of credibility is flawed and Martin and Turienzo should not have been credited. Accordingly, the judge's conclusion should be rejected.

C. The Terms Of The Settlement Agreements Are Not Repugnant To The Policies And Purposes Of The Act; To The Contrary, They Further Those Policies And Purposes And The Failure To Give Them Effect Is Contrary To The Act's Policies And Purposes.

The judge erroneously found that the settlements were repugnant to the Act because they included provisions regarding confidentiality and non-disparagement. The judge provides no analysis as to why confidentiality would be repugnant to the Act. She erroneously and contrary to elementary contract law refuses to give effect to the intent of the parties in the interpretation of a term of the contract as a non-disparagement clause. Her conclusion should be rejected.

"The basic purpose of the National Labor Relations Act is to preserve industrial peace." *NLRB v. Financial Inst. Employees*, 475 U.S. 192, 208 (1986). In *Septix Waste*, 346 NLRB 494, 494-95 (2006) the Board noted it has a longstanding and well-established policy of giving effect to private settlements because they effectuate labor peace and non-litigation solutions to labor disputes. Further, this policy cannot be effectuated if parties to such settlements are later allowed to circumvent them by reviving the disputes that were settled. *Id.* In that case, the union settled charges against the employer, then filed charges based on events that occurred prior to the settlement. *Id.* The Board refused to permit such circumvention of the settlement. *Id.*

An example of facts in which private settlements were found repugnant to the act is found in *Alamo Rent-a-Car*, 338 NLRB 275 (2002). In that case, the private settlements were not given effect because they did not serve the public interest, even though fraud, duress, or coercion were not alleged. *Id.* at 275-76. The Board observed that only one of four discriminatees had agreed to be bound, that the general counsel opposed the settlements, that the settlements failed to address substantial portions of the case they purported to settle, and failed to remedy a number of 8(a)(1) and 8(a)(3) allegations in the case. *Id.* This long list of issues – not

a single or isolated issue – led the Board to conclude that the settlements did not advance the public policy of the Act and refused to give them effect.

By contrast, in *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 445 (D.C. Cir. 2004), the Board refused to accept an administrative law judge's conclusion that a grievance settlement was repugnant to the act merely because it settled a discharge that purportedly occurred because of the employee's protected activity. The Board refused to effect the settlement on other grounds, which the court rejected. *Id.* Moreover, under *Independent Stave*, a settlement will not be found "repugnant" unless it is "palpably wrong." 287 NLRB at 743, *cited by Catalytic Inc.*, 301 NLRB 380, 383 & n.15 (1991). In *Catalytic*, the Board noted that just because an employee did not receive all the remedy to which he might be entitled did not render the settlement "palpably wrong." *Id.; see also U.S. Postal Serv.*, 300 NLRB 196, 197-98 & n.12 (1990) (as in *Catalytic*, finding settlement not palpably wrong because employee did not receive full purported remedy).

It is fundamental law that the meaning of a contract, including contracts settling unfair labor practice charges, is the intent of the contracting parties. *See, e.g., Flint Glass Workers v. Beaumont Glass Co.*, 62 F.3d 574, 578 (3d Cir. 1995) (denying summary judgment regarding interpretation of settlement agreement between union and employer); see also *Allied Mechanical Servs., Inc.*, 352 NLRB 662, 663-64 (2008) (looking to language of settlement agreement to determine legal effect of settlement agreement), *enf. den. & vac. on other grds.*, Case No. 08-1213, 08-1240, 2010 WL 4226000 (D.C. Cir. Sept. 20, 2010); *Park-Ohio Indus.*, 283 NLRB 571, 572 (finding the phrase in an unfair labor practice case settlement agreement "other matters hereafter litigated" inherently ambiguous and requiring evidence of intent to construe).

Notably, no case could be found in which a private settlement – or a settlement of any kind under the Act – was found "repugnant" or "palpably wrong" based on the existence in the

document of a particular word or phrase. Further, as the cases cited above demonstrate, it is the intent of the parties that defines the meaning of the language of a contract. The sole direct evidence in this record of the meaning of the phrase "union activities" as it is used in the settlements is the consistent testimony of Robert and Frank Unanue. They both testified that the phrase was intended and understood by all to mean that the former employees would stop participating in the union's ongoing slander and smear campaign against Goya. T 340-41, 371-72. Turienzo, counsel for the general counsel's central witness, indirectly corroborated this understanding when he testified that the essential terms of the settlements were for him stop slandering Goya. T 127, 133.

Even if the term "union activities" did encompass some statutory right, which it did not, the Board has noted that unions may waive statutory rights of employees and that such waivers will be given effect. *See, e.g., U.S. Postal Serv.*, 300 NLRB at 197 & n.10 (waiver of individual rights by union in settlement agreement); *see also Springfield Terrace, Ltd.*, 355 NLRB No. 168 at 1 (Aug. 27, 2010) (noting, in contract context, that fundamental rights under the Act may be waived). Thus, the Board has countenanced out-and-out, unequivocal waivers of individuals' rights protected by the Act, waivers affected by third parties, no less. A waiver of statutorily protected rights by the individual himself can be given no less dignity. In fact, an individual's waiver of his own rights has been accorded less protective oversight by the Board. As the Board observed in *Children's Hosp. Oakland*, 351 NLRB 569, 571 (2007), a union's waiver of individual rights must be "clear and unmistakable"; there is no such requirement for an individual's waiver of his own rights because there is no concern over third party waiver.

The judge's rejection of this argument was based on a paternalistic view that Martin and Turienzo were ignorant, had no understanding of what they were doing, and were overawed or

intimidated. "Turienzo explained that he was not an attorney, had never attended law school, or drafted a legal document." Decision at 19. Apparently the judge has created a new legal standard for competence to enter into a binding contract – that the parties be lawyers. Additionally, she found that there was no credible evidence to support the conclusion that the "union activities" term was intended to preclude disparagement, even though the testimony of both the Unanues and Turienzo's testimony (before his prepared rebuttal examination) show that it was.

Martin testified that he had the settlement offer for two to three weeks before he signed it. Turienzo testified, incredibly, that he had it for 25 minutes before signing it, although he clearly lied about this, as shown by Martin's testimony. Turienzo did not, significantly, testify that he was told he had to sign on the spot. Each had plenty of opportunity to review the settlement and obtain counsel. Martin said he did, in fact, obtain counsel – from Turienzo, who advised him to sign it. Both men had opportunity to review and understand the terms, including the "union activities" term. Both undisputedly signed the settlements. Both acknowledged the "union activities" clause. Both admitted they signed voluntarily and without coercion – their words and the words of the Board agent or agents who took their affidavits, admitted by both on the witness stand.

The men's agreement to the terms of these settlements, including the "union activities" clause – whether it means "no disparagement" or something else – was voluntary and knowing. The Board should defer to the free choices made by these men and not fall back on some strained interpretation that an isolated, willfully misconstrued phrase makes it permissible for the Board to cast aside valid contracts between private parties.

D. <u>All Of The Independent Stave Factors Weigh Heavily In Favor Of Giving Effect To The</u> Settlements.

As discussed above, the judge erred when she concluded that the settlements were obtained through fraud and that the settlements are repugnant to the Act. She likewise erred in finding two other factors weighed against Goya and she erred by failing to give any weight to the factor that she admits favored Goya (or, as she puts it, "may not support the rejection of these settlement agreements...." Decision at 20. As noted above, no one factor is to be given determinative effect. *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB at 615. *A priori*, no factor can be totally disregarded, as the judge did with the factor that no one could possibly deny weighed for Goya.

Factor 1 is whether the parties have agreed to be bound. Goya certainly agreed to be bound and lived up to its end of the bargain. Both Turienzo and Martin agreed to be bound when they signed. Martin in testimony stated that he believed himself still be bound. T 268. Although Turienzo testified that he felt he was not bound – which is not the same as whether he agreed to be bound – he did testify that he understood he was getting money (and cashed the check) and that he understood he was giving up employment and other terms of the settlement. T 142, 149, 152, 162, 164-65. The union and the general counsel, of course, both oppose giving effect to the settlements. The judge discounts the parties' agreement on the basis, debunked above, that Martin and Turienzo did not understand what they were doing. As this rationale is not based on competent and substantial evidence and because it is an incorrect legal conclusion, the judge's conclusion against Goya on this factor likewise is flawed and should be rejected.

Factor 2 is whether the settlement is reasonable in light of the violations alleged, the risk inherent in litigation, and the stage of the litigation, all judged as of the time the settlements are entered into. All the settlement agreements were entered into at a time when it had not been

established that the employer had violated the Act – ever. The ALJ's recommended decision was not issued until February 2001, four months or more after the settlements were entered into. In fact, it would be six years before liability was established by the decision of the Board in and eight years before it was finally established by the decision of the court in that case. The matter cannot be judged in hindsight and must be viewed from the perspective of litigants considering a hotly contested trial now already months without even the initial decision, a trial that involved a multitude of charges and allegations of all sorts in which their discharges were only a part. Certainly the men should be permitted to choose multiple tens of thousands of dollars paid immediately over the risks of litigation and delay of payment of any eventual award of that long a period or longer.

Another aspect of reasonableness is the settlement amount compared to the risks of litigation. The judge acknowledges that the risks must not be viewed in hindsight – but then reasons that these risks must have been small because the strength of the Board's case had been demonstrated. Recall that the decision of the administrative law judge was still months in the future when the settlements were signed. The "strength" of the Board's case was "demonstrated" by the evidentiary hearing. But there is nothing in the record to show that Turienzo or Martin viewed that hearing. In fact, both were testifying witnesses in that hearing and would have been excluded from the hearing when not testifying. Moreover, Turienzo admitted in this hearing that he was not a lawyer. As he was, therefore, incapable of understanding a simple agreement, he certainly could not possibly gauge the strength of the Board's case based on a hearing he did not attend. Nonetheless, concludes the judge, he must have known that the Board's case was strong and, therefore, the risks of litigation low, making a settlement worth a year's pay unreasonable.

This is nonsense. When these settlements were entered into in October 2000, it was far from certain how the litigation would eventually be resolved. Not only was the eventual outcome very much in doubt, but Martin and Turienzo could look forward to many years of litigation before they could receive any award. Indeed, even now the award and its amount is in doubt and it could be more years before any of these men receives any back pay award, if at all. Even today, any interim amounts the men have earned must properly be set off against any back pay award. Certainly, Turienzo has earned income in the interim and there is doubt as to Martin's ability to work in the interim, both of which either will or could reduce back pay obligations. Thus, a payment of \$22,000 or \$25,000 made in 2000 dollars, judged against its future value and the uncertainty of ever getting any money at all is more than reasonable.

The judge also finds the settlements unreasonable because they did not address all the alleged violations of the Act at issue in the 2000 hearing and did not include a posting by Goya. Most of those allegations had nothing to do with Martin and Turienzo. They could not have purported to have waived remedies as to, for example, alleged violations involving salesmen's assignments or supposed threats made to other employees. The judge based her rejection, in part, on the failure of the settlements to address employee "interests" that these former employees did not possess. The interest of Martin and Turienzo was money and reinstatement. The settlements provided money in exchange for the waiver of reinstatement or further money. Martin and Turienzo's interests were accommodated. The judge rejects the settlements because they do not address the concerns of individuals not involved in the settlements. This is not a principled conclusion and should be rejected.

Factor 4 is whether the employer had engaged in a history of violations or has breached prior settlements – again viewed from the time at which the settlements were entered into. The

judge could not find that Goya had any such record. Instead, she gave no weight to this factor – "Thus, this ... factor is not an issue with respect to the analysis" Decision at 20 – which is clear legal error. *Independent Stave* sets out a non-exclusive list of factors to be considered. It does not hold that factors favorable to the employer are to be disregarded. No one factor is to be determinative – which means, perforce, that all factors must be given proper weight. The judge gives this factor, which she admits, though indirectly, supports Goya, no weight. In fact, she drops it from the analysis altogether. This departs from Board authority, this is not the reasoned decision-making required by the Supreme Court, and this must be rejected. *See Allentown Mack v. NLRB*, 522 U.S. 359 (1998).

Rightly viewed, only the opposition of the union and the counsel for the general counsel, out of all the *Independent Stave* factors, weighs against the settlements. All the other factors weigh for them. No single factor can be given determinative weight. Accordingly, under the law, the settlements should be given effect.

E. The Evidence And Testimony Adverse To Goya Is Not Credible.

The sole evidence upon which the judge concluded there was fraud and most or all of the basis upon which the judge concluded the settlements were repugnant to the Act was the testimony of Turienzo and Martin. Their testimony is completely incredible. Their stories are absurdly unbelievable on their faces. Each man fundamentally contradicted himself in testimony. The testimony of each contradicted the testimony of the other. Turienzo, especially, demonstrated a demeanor and in-court conduct that renders his testimony incredible. As such, this fairy tale about fraud cannot be believed.

The Board and the courts traditionally give deference to the credibility resolutions of administrative law judges. However, "when the theory of credibility is faulty, then the

credibility resolution itself must fall." *Custom Recovery v. NLRB*, 597 F.2d 1041 (5th Cir. 1979) (citing *NLRB v. Florida Citrus Canners Corp.*, 311 F.2d 541 (5th Cir. 1963)). The Board will give no or less deference to a judge's credibility resolutions, even when based on demeanor, when the judge ignores or gives insufficient weight to critical evidence. *Marshall Engineered Products Co.*, 351 NLRB 767, 769 & n.10 (2007) (rejecting a judge's credibility resolution where the resolution was partly based on demeanor and partly not), (citing *Braclo Metals, Inc.*, 227 NLRB 973 n. 4 (1977)). The Board may remand where a judge has failed to consider testimony or other evidence requiring a credibility resolution. *See, e.g., Saigon Gourmet Restaurant*, 353 NLRB No. 110 at 2 (2009). Further, the Board will proceed to make its own credibility resolutions where the judge's resolutions are not wholly based on demeanor. 351 NLRB at 768 & n. 7 (citing *J.N. Ceazan Co.*, 246 NLRB 637, 638 & n.6 (1979)).

Turienzo testified that Mr. Frank Unanue called him to arrange a meeting, one or two days before that meeting, which occurred on October 31, 2000. T 127. He stated that he met with Mr. Frank Unanue and Mr. Robert Unanue at an office near Goya's Miami facility. T 126-27. He claimed there was only one meeting. T 127. He said that Mr. Frank Unanue told him that the union had lost the unfair labor practice case and that Goya wanted to give him \$22,000 because he had been a good employee for 13 years if he would sign a paper saying he would not talk bad about Goya. T 127. He said he had doubts about the settlement. T 128. However, although he claimed the meeting lasted 25 minutes, and despite his doubts, he also claimed that he merely glanced at the four-page document. T 136; GC 4(b).

Turienzo also testified that Mr. Frank Unanue told him that "the NLRB had voted against [the union]." T 134. Turienzo gave no explanation of how Mr. Frank Unanue might know about the outcome of the case or why, despite his "doubts," he did not ask. Contrary to the allegations

of the Specification in this case, Turienzo did not testify that he was told that the administrative law judge was aware of the settlement offer. He did testify in direct contradiction to his other testimony, that nothing was said in this meeting about the NLRB proceedings, meaning the unfair labor practice trial. T 132.

Turienzo said he was aware when he signed the agreement that it included a confidentiality provision, that it required him not to smear Goya, and that he was giving up reinstatement and all claims against Goya (including any remedies arising from claims brought on his behalf), T 127, 133, 142, 152, 164, 165. He testified that he entered into the agreement without coercion of any kind, freely and of his own volition. T 149-50.

Turienzo's testimony was riddled with inconsistencies. He said that he never had a conversation with Mr. Robert Unanue before the meeting at which he signed the settlement. T 146:6-9. Then he said, "If I did, I might have spoken two words with him in a cafeteria having coffee." T 146:12-13. However, Robert Unanue did not arrive at Goya Foods of Florida until after Turienzo had already left Goya – so there would have been no opportunity for them to meet in such a way. T 73-74. Moments later, Turienzo testified that he spoke with Robert Unanue "a day, 10 days, 15 days before" – so now he was saying he had spoken with him three times – and then in the same sentence said "but I've never had a meeting with him or spoken to him." T 148:15-16.

It is clear from Turienzo's initial telling of his tale on direct examination that he was conveying that he received a call from the blue from Frank Unanue telling him only that a meeting was desired on an unknown subject. T 126-27. Within one or two days, he met with Mr. Frank and Mr. Robert Unanue, a settlement offered was revealed, a document was presented to him, and he signed on the spot without talking to anyone about it. T 127. He was told that the

case was lost by the union or the Board. He had doubts about this, but did not voice them or ask questions or delay signing. He did not claim he was told he had to sign immediately or that the offer would be withdrawn or anything of the sort. He also said he memory of that time was fuzzy, but admitted he remembered the meeting clearly and in great detail. T 148.

He testified that he could not find employment after he left Goya. T 162. Then, when confronted with the truth on cross-examination, he admitted that he did have a job, with the union. T 170-71. He also admitted he had been smearing Goya. T 171.

The testimony of Martin, which had problems of its own, shows clearly that one or both men were lying about what was said between Goya and them. Turienzo signed his settlement on October 31, 2000. Martin signed on October 4, 2000. Turienzo testified as if the first he had heard of Goya offering settlement or the union having lost the case was at his meeting on October 31. However, Martin stated in his 2008 affidavit to the Board and testified at the hearing that Mr. Frank Unanue called him in September 2000, two or three weeks before he signed on October 4. T 242-43. Martin stated in the affidavit and testified that he then spoke with Turienzo. T 245-49. Martin then said: "[A]nd he told me that the Employer also told him that the Judge of the National Labor Relations Board had decided that the Union and the employees had lost the case. That's why he said if it's like that, we would have to sign the agreement with the Employer." T 249:4-8.

Turienzo's testimony was carefully presented to suggest that he knew nothing of any settlement until a day or two before October 31 and that he heard a tale about the union having lost the case only then. Martin's statement, given in 2008 and affirmed on the stand, was that when he talked to Turienzo in early September, Turienzo already had heard from Goya about a

settlement and already knew this story about Goya representing that the case had been lost by the union.

Martin's affidavit and testimony, if credited, destroy any suggestion that Turienzo was ambushed in late October by Goya suggesting to him for the first time that he settle and telling him for the first time that the union had lost the case. Moreover, Martin's testimony, if credited, shows that Martin was aware that a settlement was offered and was aware of the alleged story about the union losing the case for at least two weeks before he signed. By the same token, Turienzo was aware of the same information for upwards of two months before he signed and even went so far as to advise Martin to accept the settlement, which does corroborate his indication to Robert Unanue that he could deliver other employees.

Thus, crediting Martin, neither he nor Turienzo can possibly claim that they did not have ample opportunity to consult whomever they wished about the idea of settling and to ascertain the status of the unfair labor practice trial. Martin's excuse that he did not have a telephone number for the union – and made absolutely no effort to find it – is patently incredible. See T 244. Even if he is credited with being that passive and unresourceful, he did manage to contact Turienzo. Turienzo was working for the union and certainly knew how to contact it. Nonetheless, he testified, he did not do so and that he did not speak to any attorney or "representative" before signing, the clear implication being that he had no opportunity to do so. T 136-37. In fact, if Martin is credited, Turienzo had two months in which to consult whomever he wished, but did not do so. Instead, for his own reasons, he signed and he strongly encouraged Martin to sign.

The judge fails to deal with or even mention this inconsistency between Martin's affidavit and testimony and Turienzo's testimony regarding when Turienzo knew about the

settlements and their content. The judge instead blandly accepts Turienzo's story and credits his entire testimony, despite its obvious inconsistencies and out and out falsehoods. This is the sort of faulty method of resolving credibility questions that permits the Board – or a court – to overturn the judge's findings. Moreover, a decision based on false or otherwise incredible testimony is not based on competent and substantial evidence and is not worthy of any deference, but must be rejected.

Martin also testified that he was contacted by Goya employee Gilberto Torres about the settlements. T 237. Martin said Torres told him the case was lost and urged him to sign the settlement. T 237. At that time, Torres was a rank and file employee and not a Goya supervisor and had never been a Goya supervisor. R3 (showing status change on May 14, 2001)⁶; T 376. This testimony is incredible. Torres flatly denied it. T 375. Moreover, Martin's testimony was contradictory. He said that he believed Torres that the case was lost, because Torres was a good friend. T 258. In the very moment of his supposedly believing Torres, however, Martin also believed that Torres had and was at that very moment betraying him. T 258, 277. Moreover, it

Counsel for the general counsel also introduced documents showing loans or advances from Goya to Torres before and after the time of these alleged conversations. GC8-14. The plain suggestion is that Torres was bribed to contact Martin. Counsel for the general counsel asserted that the loan amounts near the time were larger than prior advances had been. Counsel for the general counsel's deceptively selective exhibit, however, fails to show that Torres had received loans throughout his time at Goya, from 1993 through 2010, in amounts as much or more than those pointed to by counsel for the general counsel, and at times greatly remote from these events. R5(a)-(u) (including loans of \$500 in 1994, \$500 in 1996, \$5,000 in 2003, \$2,500 in 2006, \$1,220.78 in 2007, \$3,000 in 2009, and \$3,000 in 2010. It is undisputed that such loans to employees are very common. T 394. Counsel for the general counsel's attempt to impeach Torres in this way was ill-conceived and so ineffective as to be pathetic. Torres' testimony denying Martin's claims that he spoke to Martin and urged him to settle and told him the case was lost and that Goya was not trying to trick him should be credited.

was only because Martin believed Torres – which is in itself incredible – that he believed Mr. Frank Unanue when Mr. Unanue allegedly said the union had lost the case. T 261. This is so contradictory that it is nonsensical. This testimony cannot be credited.

To sum up: Turienzo suggested that his first inkling that Goya wanted to settle was when Frank Unanue called him about October 29. He likewise implied that he first heard a story about the case being lost on October 31. He suggested that he had no opportunity to consult with anyone about the story or whether he should settle. Nonetheless, in his affidavit and on the stand, Turienzo said he signed the settlement freely. Martin testified in his affidavit and/or on the stand that he called Turienzo in September and Turienzo already knew about the settlements and the story about the case being lost – and that Turienzo advised him to settle. Thus, if Martin is credited, he had at least two weeks to check on the story and to consult whomever about settling. Turienzo had almost two months to do the same.

Additionally, there were two empty chairs in the courtroom. Counsel for the general counsel could have called Bravo and Galvez to testify. As discriminatees, they presumably would have testified favorably for the union and counsel for the general counsel. Both were present at the initial group meeting. Bravo was present for subsequent meetings and communications. Bravo even eventually settled with Goya at about the same time and on about the same terms as the other two. GC5. That counsel for the general counsel could have but failed to call these witnesses suggests that their truthful testimony would not have supported her case and, therefore, an adverse inference should be drawn. Goya's request for an adverse inference was made to the judge in Goya's brief; the judge utterly fails to mention it or rationalize why she did not make the adverse inference.

As mentioned in the Statement of Facts, above, Turienzo twice had outbursts in the courtroom during witness testimony. One was caught on the record and both were objected to by counsel. The second outburst occurred after the Judge issued a warning the first time. Both were commentary or Turienzo's own answer to the question before the witness that evidenced animus toward Goya. Hostility of a witness toward a party is always relevant to the witness' credibility. E.g., Jones v. Shcanck, 248 F.2d 658, 659 (D.C. Cir. 1957). Turienzo, of course, might well be expected to be hostile toward Goya. He was discharged from Goya years ago and he claimed he suffered financial hardship because of it. He sat through these entire proceedings, thus evincing a keen interest in the outcome. His outbursts were hostile and his transparent attempts to cover them or flee from their consequences evinced consciousness of guilt. His outbursts and his sarcastic remark to one of Goya's attorneys in response to an untranslated question (T 165:6-8) also show that he understands English far better than he told the judge he did under testimony. His willingness to lie about this must weigh against his credibility. Moreover, the judge relied on his supposed inability to speak English in crediting his testimony. Decision at 14, 16-17. His demeanor and conduct must weigh against his credibility as a witness.

Finally, it must be recognized that this concoction of Turienzo's that Mr. Frank Unanue said the union lost the case and Goya wanted to give him money because he had been a good employee is utterly unbelievable on its face. Why on earth would a company seek to settle a case if it already had won it? Why on earth would a company that had fired an employee more than a year earlier for misconduct tell him it wanted to give him \$22,000 out of the goodness of its heart? Why on earth would it be worth so much to try to get one or two men to stop slandering the company when the slander, which was driven by the union and which these men

could not control, would continue? The answers, of course, are that no one would and Goya did not. Moreover, it also must be admitted that this idea that the discriminatees could be deceived and motivated into signing settlements by telling them the case was lost is simply silly. Any reasonable person who was told such a thing would immediately confirm it. These were men who had been active in the union. Turienzo still worked for the union. Martin, his unbelievable story about losing the union phone number aside, did get in touch with Turienzo. By Martin's admission, they each had weeks to find out the status of the case. A simple call to Arturo Ross or anyone at the labor board office or to anyone at the union would suffice. And yet, inexplicably – unbelievably – they did not do so. They did not, according to what they and counsel for the general counsel would have the Judge believe, lift a finger to check this extremely important fact. Both men testified that they doubted the story. Yet they did not check. Martin relied on Turienzo and on Torres – the man he said betrayed him. Turienzo offered no explanation at all. (And it is on this point that Ross' testimony would be telling, as is argued below.) The story put forward by counsel for the general counsel and these witnesses is wildly unbelievable.

By contrast, the truthful testimony of the Unanues should be credited. Their testimony was consistent, although told from each one's differing perspective. The demeanor of each was convincing – calm, deliberate, and unshakeable on cross-examination. They both denied the Turienzo-Martin stories in all their false particulars. T 305, 308-10, 314-15, 360, 364-66.

The truth of the matter, as set forth in the Statement of Facts, above, is that Turienzo contacted Mr. Robert Unanue and offered to settle and to broker settlements with the other discriminatees. There were two group meetings and a number of telephone calls back and forth between one or another of the Unanues and the various men. Turienzo wanted confidentiality

because he did not want the union, for whom he worked, and his former co-employees to think he was a sellout. Turienzo offered to trade a halt to the slander against Goya in return for money. Goya took him up on his offer and he delivered Martin.

One episode in particular is worth a few more words, as noted in footnote 2, above, and completely ignored and not dealt with by the judge. Counsel for the general counsel failed to realize that the Frank Unanue who testified in the June 2000 trial was not the same Frank Unanue who testified in these proceedings. She attempted to pursue a line of questions based on the opinion of the administrative law judge to show that Frank Unanue had a great desire to eliminate the union presence from Goya Foods of Florida. She claimed it was of great relevance to show his motive, presumably to defraud and deceive Turienzo and Martin into settling. Having so miserably and embarrassingly failed, counsel for the general counsel is left with zero evidence of the Unanues' motives and zero ability to impeach their credibility as witnesses.

Despite all this, the judge discredits the Unanues and credits Martin and Turienzo. The basis of her credibility resolution is remarkable and is, to say the least, faulty. She discredits the Unanues because each witness' testimony was "precise" and "consistent." She credits Martin and Turienzo because their testimony "was not polished" and "was much less specific." She also credits their testimony because they were frequently interrupted and the translation was poor. Decision at 14. "Precision" and "consistency" generally is regarded as a reason to credit testimony rather than the opposite. *See, e.g., Domsey Trading Corp.*, 351 NLRB 824, 849 (2007) (finding judge erred by failing to credit consistent testimony); *Gibralter Steel Corp.*, 323 NLRB 601 (1997) (crediting testimony of witness only where it was consistent with testimony of another witness). On the other hand, testimony that is unspecific may be discredited on that basis. *See, e.g., Gates Rubber Co.*, 30 NLRB 170, 178-79 (1941) (discrediting "confused" and

"inconsistent" testimony). With regard to the testimony of Torres, the judge fails to mention or treat Torres' testimony that he did not call Martin and did not say to Martin any of the things Martin alleged. Moreover, she ignored the critical and contradictory testimony by Martin that he felt betrayed by Torres before and at the time Torres allegedly was urging him to accept the settlements. This direct contradiction in testimony between Torres and Martin and the judge's failure to deal with contradictory critical evidence requires either a rejection of the judge's findings or a remand.

The testimony of the Unanues should be credited. The contrary testimony of Turienzo and Martin should be discredited.

POINT II

REVOKING OF GOYA'S **SUBPOENA** THE FOR TESTIMONY ARTURO **ROSS MATERIALLY** OF PREJUDICED GOYA PRECLUDED AND INTRODUCTION OF EXCULPATORY EVIDENCE; AS SUCH. GOYA'S DUE **PROCESS** RIGHTS VIOLATED AND THE HEARING SHOULD BE REOPENED TO RECEIVE THE TESTIMONY.

Goya requested and issued a subpoena for testimony at the hearing of this matter to Arturo Ross, a former Board attorney in the Miami office. Ross had represented to counsel for Goya that he had spoken with Turienzo, who had told Ross he had received a settlement offer and was uncertain whether to accept it. Ross told counsel for Goya that Turienzo never mentioned being told by anyone from Goya that the union had lost the case or that the administrative law judge was aware of the settlement offer. R2; T 44-45. The Judge granted

The complete proffer of Ross' testimony is included in R2 and in the transcript and is incorporated by reference as if fully set forth here. The judge's Decision addressed only the proffer as made in R2 and completely ignored the expanded proffer and justification for the testimony made at the hearing, including the fact that Ross' testimony would directly contradict the testimony of Turienzo at the

general counsel's motion to revoke the subpoena. T 55. After counsel for the general counsel rested her case, Goya requested that the Judge reconsider her ruling on the subpoena on the grounds previously argued and also on grounds that Turienzo's testimony was in direct contradiction to the proffer of Ross' testimony and, as such, Ross' testimony now had the added relevance of impeachment of a critical witness for the prosecution. T 282. The Judge denied Goya's motion, saying that the testimony was not central and was speculative. T 287.

Rule 102.118(a)(1) provides that a current or former Board employee shall not testify in court or Board proceedings regarding information that came to his attention in his official capacity without the written consent of the general counsel.⁸ 29 C.F.R. § 102.118(a)(1). The Board and the courts have recognized that the rule creates a "limited" privilege. *Stephens Produce Co. v. NLRB*, 515 F.2d 1373, 1376 (8th Cir. 1975); *Sparks Nugget, Inc.*, 230 NLRB 275, 275 n.1 (1977). Counsel for the general counsel cited a number of Board cases for the proposition that unusual circumstances are "generally" required to overcome the privilege. General Counsel's Pet. to Revoke Respondent's Subpoena Issued to Arturo Ross, Esq. at 3-4.

The best and most cogent exposition of circumstances in which this limited privilege should not apply is found in *Drukker Communications v. NLRB*, 700 F.2d 727 (D.C. Cir. 1983). In that case, the employer and the union entered into a stipulation before a Board agent relating to the exclusion of certain positions from a proposed bargaining unit. *Id.* at 729-30. In a subsequent unfair labor practice trial, the employer served a subpoena on the agent for testimony, which was revoked by the administrative law judge, relying on Rule 102.118(a)(1). *Id.* at 730. The court stated that the decision rested upon a "balancing of need against harm, which

hearing, thus impeaching this central witness' testimony about the settlements, the central point at issue in the proceedings.

⁸ Consent was requested and denied. R2.

evaluation of this evidentiary privilege always involves...." *Id.* The court found the following factors decisively weighed in favor of requiring the testimony:

The issue to which the testimony related was central to the case. If the stipulation were honored, it would have eliminated the bargaining obligation and, thus, the employer's potential liability. *Id.* at 160.

The issue did not pertain to internal agency deliberations. *Id*.

The issue was specific and not a "fishing expedition." *Id.* at 161.

The subpoenaing party's proffer of evidence was plausible. *Id.*

The testimony was of unique value, as the only other witnesses were either aligned with the employer or against it. "The availability of other evidence is certainly a factor to be considered, but here the effect of that evidence upon the company's case would at best have been cumulative. It cannot be compared with the supporting testimony of a neutral government official." *Id.* at 162.

Participation of the Board agent in the transaction in which he acquired the information sought for testimony was of a such a nature that he was intended to receive the information. *Id*.

The proceeding was a complaint pressed by the Board against a party who needed the testimony to defend itself. *Id.* In this regard, the court stated:

It is repugnant to notions of fairness for the government to seek sanctions for alleged wrongdoing while withholding from the proceeding evidence that would demonstrate innocence. *Cf. Brady v. Maryland*, 373 U.S. 83.

Id.

Counsel for the general counsel argued that the subpoena should be revoked because other witnesses were available; because Ross would appear partial to one party or another; that Ross' testimony would not be relevant because, one, his knowledge of the settlements was

irrelevant and, two, his testimony would have no bearing on whether the settlements were repugnant to the Act. General Counsel's Pet. to Revoke Respondent's Subpoena Issued to Arturo Ross, Esq. at 4-5.

In revoking the subpoena at the hearing, the Judge stated that, "at this point" (presumably meaning "before Ross testifies"), the content of Ross' testimony was "speculative." T 54-55. The Judge relied on *Sunol Valley Golf & Recreation Co.*, 305 NLRB 493 (1991). T 54. In that case, the employer sought the testimony of a Board agent on grounds that the agent "must have" conveyed some information to the union. *Id.* at 493, 495. The Board overturned the administrative law judge's decision not to revoke the employer's subpoena, reasoning that the hoped-for testimony was speculative. *Id.*

The instant case presents a compelling example of when the limited privilege of Rule 102.118(a)(1) should not be honored. The objections raised and authorities cited by counsel for the general counsel and the articulated bases of the ruling and authority cited by the Judge are insufficient to outweigh Goya's need for the testimony and its relevance to the matters at issue; the authority is distinguishable.

Analyzing the issue as did the court in *Drukker*:

• The testimony would be central to the case. Counsel for the general counsel is claiming that Turienzo and Martin signed the settlements as a result of misrepresentations by Goya that the union had lost the unfair labor practice case, that the administrative law judge was aware of the settlement offers, and that, in the case of Turienzo, he was offered a settlement because he had been a good employee and the company did not want his family to suffer. As shown above, the assertion that Goya executives would have said these things is absurd on its face and Robert and Frank Unanue denied they were said. Ross would have testified that

Turienzo contacted him before signing the settlement. Ross was the attorney who prosecuted the case for the Board. He had been in frequent communication with Turienzo for many months before, during, and after the trial. During an extended conversation about the settlement – with the very attorney who was in the best position to know whether the case had been decided – Turienzo never asked whether there was a decision. He never said he had been told there was a decision. He never mentioned that Goya had told him anything regarding the case. In fact, Ross would have testified that Turienzo asked Ross how he felt about the chances of success in the case – a question that shows he knew that the case had not been decided and, therefore, that he could not have relied on the misrepresentation to the contrary, even if it had been made. Not only would this testimony have corroborated the Unanues' denials and undercut counsel for the general counsel's position, it would have critically discredited Turienzo on the heart of his testimony. Not only would it have shown that his story about the alleged misrepresentations was false, it also would have shown that he lied in testimony when he essentially testified that the entire transaction in which he had contact with Goya, received the settlement, and signed it lasted only two days. T 123-27. To the extent that Turienzo was an important witness for counsel for the general counsel and to the extent that counsel for the general counsel intends to base its case on the alleged misrepresentation, Ross' testimony is, indeed, central.

- Ross' testimony had nothing to do with internal agency deliberations, but pertained to
 Turienzo seeking personal advice on the settlement.
- The subject matter of the subpoenaed testimony was quite specific and not at all a fishing expedition.
- Given that the proffer of testimony was simply a summary of what this neutral former government attorney conveyed, the content of the proffer was plausible.

- The testimony was of unique value, as there were only two parties to the conversation, Ross and Turienzo. Turienzo obviously was aligned against Goya. The information was not available from any other source. This testimony could only have come from Ross.
- The nature of the conversation between Turienzo and Ross was such that Turienzo intended Ross to receive the information. Turienzo was seeking advice from Ross.
- This proceeding is a complaint pressed by the Board against Goya, which needs the testimony to defend itself. The Board is in the position of bringing charges and suppressing exculpatory evidence. While *Brady v. Maryland* may not apply to Board proceedings, the principle as a matter of fundamental fairness certainly does, as then-Judge and now-Justice Scalia wrote in *Drukker*.

Sunol is distinguishable. The employer in that case did not proffer that the Board agent would testify that he informed the union of some fact. The employer speculated that the agent "must have" told the union and it wanted to ask the question to see what the answer was. Contrast that with the instant situation in which the proffer was certain and specific and there was no speculation or uncertainty in the proffer as to what Ross would say. The Judge, on this point, stated that Goya was trying to prove a negative. T 55. In this regard, she appeared to be referring to the inference to be drawn from Ross' testimony that Turienzo not only did not ask whether the union had lost, but that he affirmatively asked how strong Ross felt the case was. Such testimony and the inferences it supports is perfectly admissible evidence of Turienzo's state of knowledge and completely at odds with the absurd tale that he was being offered money by Goya to settle a case that was already lost.

The judge's attempt to distinguish *Drukker* is tortured and difficult to understand – at best. She asserts that the *Drukker* court found the Board agent's testimony should have been

heard because he participated in reaching the stipulation at issue and, thus, could be helpful in determining whether the stipulation was "worthy" of acceptance by the Board. Without explanation, she finds this different from the instant case. We are left to guess that the difference lies, perhaps, in the judge's speculation that Ross did not participate in reaching the settlements. First, participation in the subject matter is nowhere made the basis of the *Drukker* decision. The *Drukker* court found that the Board agent should testify because his testimony touched on the central point of the dispute and met the long list of analytical factors set forth above. As explained above, Ross' testimony was central to this case for all the reasons set forth above and because it would have seriously undercut Turienzo's credibility, showing him to have lied on the witness stand.

Second, it may properly be said that Ross did participate in the reaching of the settlements, as Turienzo consulted him and asked his advice – and received it – on at least one of the four *Independent Stave* factors, that is, the risks of litigation.

Accordingly, the judge's ruling and her refusal to grant Goya's motion for reconsideration should be reversed.

<u>CONCLUSION</u>

The Decision as a whole is not based on competent and substantial evidence because it rests on faulty credibility resolutions and ignores critical evidence contradictory to that it relies upon. The Decision incorrectly applies the clear requirements of controlling precedent. The Supreme Court requires that the Board engage in reasoned decision-making; the judge flouts this requirement. The judge unjustifiably revoked Goya's subpoena of a central and critical witness, thus putting the Board in the position of suppressing evidence that would enable Goya to defend itself against charges the Board itself has brought and is prosecuting. The upshot is that the

Decision is outcome-driven and unprincipled. It should be reversed and the Board should give effect to the settlements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Suzy Kucera, Esquire, Counsel for the General Counsel, National Labor Relations Board, Region 12, Miami Resident Office, 51 S.W. 1st Avenue, Room 1320, Miami, Florida 33130 and to Ira J. Katz, Esquire, Workers United, 31 West 15 Street, New York, New York 10011, this 18th day of April, 2011.

/s/ David C. Miller
David C. Miller